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No. 15-8544

In The Supreme Court of the United States

TRAVIS BECKLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
Federal Public Defender
JANICE L. BERGMANN*
ANDREW L. ADLER
Assistant Federal Public Defenders

OFFICE OF THE FEDERAL PUBLIC DEFENDER
One East Broward Boulevard
Suite 1100
Fort Lauderdale, FL 33301
(954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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I. THE RESIDUAL CLAUSE IN U.S.S.G. § 4B1.2(a)(2) IS VOID FOR VAGUENESS

Court-appointed amicus does not dispute that U.S.S.G. § 4B1.2(a)(2)'s residual clause is vague following *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). Rather, he unpersuasively argues that the Guidelines are wholly immune from the Due Process Clause's prohibition on vagueness.

1. Amicus' "major premise" (Br. 19) is that indeterminate non-capital sentencing is constitutional. Although the Guidelines are not constitutionally required, it does not follow that they are immune from the Constitution once implemented. This Court has rejected that dangerous reasoning in other contexts. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (procedural due process); *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 330 (1970) (grand and petit juries); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (appellate review). Accepting it here "would permit the Commission to promulgate Guidelines that discriminated on the basis of a protected class, penalized the exercise of constitutional rights, or bore no rational relationship to the goals of sentencing." *United States v. Pawlak*, 822 F.3d 902, 909 (6th Cir. 2016) (citation omitted).

Furthermore, amicus overlooks that even wholly discretionary sentencing in the pre-Guidelines era was "not . . . immune from scrutiny under the due-process clause." *Williams v. New York*, 337 U.S. 241, 252 n.18 (1949). Due process has always prohibited sentencing

based not on informed discretion, but rather on a "materially false" foundation, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *see United States v. Tucker*, 404 U.S. 443, 447-48 (1972), or an "arbitrary distinction," *Chapman v. United States*, 500 U.S. 453, 464-65 (1991). Imposing a sentence based on a provision utterly devoid of meaning contravenes that constitutional proscription.

2. Amicus argues (Br. 15, 20-22, 27) that the Guidelines are immune from vagueness because they do not "regulate private conduct." But amicus cites no case in which the Court has ever immunized a legal provision from the prohibition on vagueness, let alone on the amorphous basis he proposes. To the contrary, "[v]ague laws in any area suffer a constitutional infirmity," *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966), including "vague sentencing provisions," *United States v. Batchelder*, 442 U.S. 114, 123 (1979). Consistent with the text of the Due Process Clause, the Court has liberally invoked the doctrine to scrutinize provisions, however labeled, that "depriv[e] . . . [a] defendant of his liberty." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *see Jordan v. De George*, 341 U.S. 223, 230-31 (1951).

As both "the framework for sentencing" and "*in a real sense the basis for the sentence*," the Guidelines effectuate such a deprivation. *Peugh v. United States*, 569 U.S. ___, 133 S. Ct. 2072, 2083 (2013) (citation omitted) (emphasis in original). Although amicus criticizes the Court's sentencing precedents following *United States v. Booker*, 543 U.S. 220 (2005) (Br. 20-22,

31 n.10), they have cemented the Guidelines as the single most important determinant of a defendant's sentence. *See Peugh*, 133 S. Ct. at 2083-85; *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1345-46, 1349 (2016). Uniquely immunizing them from the fundamental prohibition on vagueness would shackle due process and turn a blind eye to the realities of sentencing.

Amicus' contrary argument (Br. 28-30), stripped to its essence, is that the Guidelines merely guide a sentencing court's discretion and lack binding legal effect. *Peugh*, however, squarely rejected that identical argument vis-à-vis the Ex Post Facto Clause, which, unlike the Due Process Clause, contemplates a "law." *Peugh*, 133 S. Ct. at 2085-88. Ignoring that dispositive aspect of *Peugh*, amicus seeks to distinguish the ex post facto doctrine as concerned with legislative targeting of disfavored groups (Br. 6, 9, 28-30). Yet vague provisions facilitate the very same evil by the Judiciary and Executive, "furnish[ing] a convenient tool for harsh and discriminatory enforcement . . . against particular groups deemed to merit [officials'] displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (citation omitted); *see Johnson*, 135 S. Ct. at 2257 (condemning "arbitrary enforcement by judges"). Amicus' failed attempt to distinguish *Peugh* thus confirms what this Court has long recognized: the two doctrines are constitutional kin. *See* Pet. Br. 25-27 & n.6.[1]

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[1] For the same reasons, *Peugh* also forecloses amicus' assertion (Br. 8-9, 12-13, 32-33) that subjecting the Guidelines to

3. The only post-*Booker* precedent upon which amicus relies (Br. 7-8, 12, 24-27), rather than criticizes, is *Irizarry v. United States*, 553 U.S. 708 (2008). *Irizarry* unremarkably held only that, after *Booker*, defendants lack a due-process expectation of a sentence within the guideline range, and thus need not be notified that a court may vary from that range. 553 U.S. at 713-14. Amicus contends that it follows therefrom that a defendant has no due-process right to notice of the guideline range *at all*. But that again reprises an argument unsuccessfully advanced by the government in *Peugh*. Brief for the United States 11, 41, *Peugh*, 133 S. Ct. 2072 (2013) (No. 12-62), 2013 WL 315237. Furthermore, *Irizarry* did not confront the vice of arbitrary enforcement with which vagueness and *Johnson* are principally concerned. *See Peugh*, 133 S. Ct. at 2085 (plurality); *United States v. Hurlburt*, 835 F.3d 715, 724 (7th Cir. 2016) (en banc). Because courts are legally required to calculate the guideline range and use it as the basis for sentencing, *Peugh*, 133 S. Ct. at 2083, due process requires that the Guidelines be intelligible.

4. Amicus speculates that subjecting § 4B1.2(a)(2) to vagueness would jeopardize other guidelines (Br. 31-32). But *Johnson* carefully limited its holding to provisions combining the "serious potential risk" standard with the "idealized ordinary case" analysis. 135 S. Ct. at 2561. Section 4B1.2(a)(2)'s residual clause is the only guideline with that combination in its text; all others analyze "real-world" conduct. *See Hurlburt*, 835

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vagueness would jeopardize the *Booker* remedy. *See* 133 S. Ct. at 2087-88.

F.3d at 724-25. The same is true of the 18 U.S.C. § 3553(a) factors, which, unlike § 4B1.2(a)(2), do not require an objective legal determination. Revealingly, amicus does not identify a single post-*Johnson* case where the text of any other guideline or § 3553(a) factor has even been challenged as unconstitutionally vague.

Furthermore, amicus conflates the role of the Commission with that of the Judiciary by asserting that vagueness challenges to the Guidelines "threaten[] the work of the Commission" (Br. 33). The Commission is a "policymaking" body, "not a court." *Booker*, 543 U.S. at 243 (citation omitted). As a result, it may amend the Guidelines as a "matter of policy," as it did following *Johnson*. 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). But the Commission is not charged with interpreting the Constitution. And, like other agencies, its policymaking duties cannot shield its regulations from constitutional examination by the Judiciary. *See* Pet. Br. 23-24.

Likewise, it is for the Court to decide, as a "constitutional matter," the retroactivity of new rules of constitutional law. *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016). Despite amicus' impertinent suggestion (Br. 5, 11, 33-35), the Commission's decision not to make a guideline amendment retroactive on policy grounds cannot usurp the Judiciary's constitutional role. Regardless, the Commission declined to make its recent amendment to § 4B1.2(a) retroactive not because it deemed that course unwise as a policy matter, as amicus inaccurately states (Br. 34 & n.12),

but because "major data limitations" rendered "impossible" a "meaningful and complete retroactivity analysis." Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n, Remarks for Public Meeting 4 (Jan. 8, 2016).[2]

The Guidelines are not immune from the due-process prohibition on vagueness. Accordingly, § 4B1.2(a)(2)'s residual clause is void for vagueness.

II. RETROACTIVITY POSES NO BAR TO RELIEF

1. The government acknowledges (Br. 29) that the substantive rule in *Johnson* has retroactive effect "to all defendants on collateral review." *See Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016) (*Johnson* has "retroactive effect in cases on collateral review"). That includes Petitioner. Nonetheless, the government asserts (Br. 15, 18, 28), without supporting authority, that the relevant rule for retroactivity purposes is not the one announced in *Johnson*, *see* Pet. Br. 14 (articulating rule), but rather the rule Petitioner purportedly "seeks" – *i.e.*, that § 4B1.2(a)(2)'s residual clause and its commentary are void. The government's effort to re-characterize the rule is incompatible with the Court's jurisprudence since *Teague v. Lane*, 489 U.S. 288 (1989).[3]

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[2] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf.

[3] Notwithstanding the government's discussion (Br. 29-31), Justice Harlan's pre-*Teague* opinions in *Mackey v. United States*, 401 U.S. 667 (1971), and *United States v. U.S. Coin & Currency*,

Where, as here, a prisoner seeks collateral relief based upon "a case decided after [his] conviction and sentence became final," a federal court must "answer an initial question, and in some cases a second." *Stringer v. Black*, 503 U.S. 222, 227-28 (1992). "First," the court must "determine[] whether the decision relied upon announced a new rule," because the rule was not "dictated by precedent existing at the time the judgment in question became final." *Id.* at 227-28. "If, however, the decision did *not* announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Id.* (emphasis added). This second step is necessary in the latter scenario because "[t]he interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Id.*

Here, the analysis ends at *Stringer*'s first step. Petitioner relies on the rule announced in *Johnson* after

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401 U.S. 715 (1971), do not support the proposition that one rule may have retroactive effect in some collateral cases but not others. *Coin & Currency* arose on direct (not collateral) review, which, in Justice Harlan's view, "suffice[d] without more" to support retroactivity. 401 U.S. at 724 n.13. Indeed, the government does not dispute that affording *Johnson* retroactive effect to some collateral cases but not others would contravene *Teague*'s categorical approach, several statutory provisions codifying that approach, and *Welch*'s unqualified holding. *See* Pet. Br. 34-40.

his conviction became final. He concedes *Johnson*'s rule is "new" as to him. Thus, the underlying interests in finality and predictability are unquestionably implicated, rendering *Stringer*'s second step unnecessary. The only remaining issue is whether the new rule announced in *Johnson* satisfies a *Teague* exception. *Stringer*, 503 U.S. at 228. Because *Welch* held that *Johnson* announced a substantive rule, the retroactivity inquiry here is complete.

The government would nonetheless have the Court ask whether applying *Johnson*'s new rule to Petitioner's case would create *another* new rule that must separately satisfy one of *Teague*'s exceptions. It would thus require *Stringer*'s second step not only in cases where the petitioner relies on an old rule in a new context, but also those where the petitioner relies on a new rule from the outset. Doing so would not only contravene the plain language of *Stringer*, but conflict with this Court's retroactivity precedents.

Since *Teague*, the Court has only conducted *Stringer*'s second step in cases where the petitioner relied on a rule that was not already new.[4] The Court has never asked whether applying a *new* rule to a petitioner would create a *second* new rule. Rather, in every

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[4] *See Gray v. Netherland*, 518 U.S. 152, 158, 167-70 (1996); *Caspari v. Bohlen*, 510 U.S. 383, 390-97 (1994); *Graham v. Collins*, 506 U.S. 461, 467-78 (1993); *Saffle v. Parks*, 494 U.S. 484, 488-95 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 314-19 (1989); *Teague*, 489 U.S. at 299, 301, 311.

case where the petitioner relied on a decision announcing a new rule, the Court has simply asked whether that rule satisfied a *Teague* exception.[5]

The Court's most recent retroactivity decisions confirm that *Stringer*'s second step is inapplicable where, as here, the petitioner relies on a new rule rather than seeks to extend an old one. In both *Welch* and *Montgomery*, the petitioner relied on a new rule, and the Court declared the rule substantive. In each case, however, the Court expressly declined to opine on the new rule's application to the petitioner's case. *See Welch*, 136 S. Ct. at 1268; *Montgomery*, 136 S. Ct. at 736. And it therefore did not inquire whether applying the new rule to the petitioner would have created a second new rule. Yet the Court would have been required to conduct that inquiry if the government's approach here were correct. *See also Sawyer*, 497 U.S. at 233-34 (declaring it unnecessary to address whether application of a new rule to petitioner "would itself involve a new rule of law").

Adopting the government's approach would not only be unprecedented, but would "destabilize" and unnecessarily complicate the "established retroactivity

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[5] *See Welch*, 136 S. Ct. at 1263-65, 1268; *Montgomery*, 136 S. Ct. 725-26, 732-37; *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103, 1107 & n.3 (2013); *Whorton v. Bockting*, 549 U.S. 406, 416-17 (2007); *Beard v. Banks*, 542 U.S. 406, 410 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 351-53 (2004); *O'Dell v. Netherland*, 521 U.S. 151, 159-68 (1997); *Lambrix v. Singletary*, 520 U.S. 518, 526-39 (1997); *Gilmore v. Taylor*, 508 U.S. 333, 338-46 (1993); *Sawyer v. Smith*, 497 U.S. 227, 229, 232-42 (1990); *Butler v. McKellar*, 494 U.S. 407, 408-09, 414-16 (1990).

framework." U.S. Br. 33. Determining the retroactive effect of a new rule would no longer involve a bright-line inquiry focused on a rule of law. It would instead turn on the infinitely-variable circumstances of each particular case. The slightest difference between a decision announcing a new rule and a petitioner's case would require a new, additional layer of analysis. That would render this Court's retroactivity precedents good for one case only and enmesh lower courts in endless retroactivity litigation.

Accordingly, the Court should decline the government's unsupported invitation to inquire whether applying *Johnson*'s new rule to Petitioner's case would create a second new rule. Of course, Petitioner must establish that *Johnson* renders § 4B1.2(a)(2)'s residual clause void in order to obtain the sentencing relief he seeks. *See* Pet. Br. 37-38. But because he relies upon *Johnson*'s new rule, the only question relevant to the threshold retroactivity inquiry is whether that rule falls within a *Teague* exception. *Welch* answered that question affirmatively. Therefore, the substantive rule in *Johnson* has retroactive effect. It is part of the body of law "available to petitioner as a ground upon which he may seek relief." *Sawyer*, 497 U.S. at 234.

2. Regardless, even if the relevant rule here is *Johnson*'s invalidation of § 4B1.2(a)(2)'s residual clause, that rule, too, is substantive.

Johnson announced a substantive rule because it has "a substantive function" – that is, it "changed the substantive reach of the Armed Career Criminal Act,"

18 U.S.C. § 924(e) ("ACCA"), "rather than the judicial procedures by which [it] is applied," *Welch*, 136 S. Ct. at 1265-66. "Before *Johnson*, the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause." *Id.* at 1265. "After *Johnson*, the same person engaging in the same conduct is no longer subject to the Act." *Id.* As a result, *Johnson* "alter[ed] the range of conduct or the class of persons that the [Act] punish[ed]." *Id.* at 1264-65 (citation omitted).

Johnson's invalidation of § 4B1.2(a)(2)'s residual clause likewise "change[s] the substantive reach" of the career-offender guideline. *Id.* at 1265. Before *Johnson*, defendants with three convictions for a "crime of violence" qualified as career offenders, "even if one or more of those convictions fell under only the residual clause." *Id.* "After *Johnson*, the same person engaging in the same conduct is no longer subject to" the enhancement. *Id.* Accordingly, the rule "alters the range of conduct or the class of persons that the [guideline] punishes," "rather than the judicial procedures by which [it] is applied." *Id.* at 1264-65 (citation omitted). It is therefore a substantive rule. *See* Pet. Br. 16-17, 41-46.

Ignoring that argument, the government focuses instead on the rule's "practical effect" and "operation" (Br. 11-12, 20, 23-24, 27). But that only confirms its substantive function. The Court has expressly recognized that increasing an advisory guideline range "create[s] a significant risk of a higher sentence." *Peugh*,

133 S. Ct. at 2088 (citation omitted); *see id.* at 2084 (citing "considerable empirical evidence" to that effect); *Molina-Martinez*, 136 S. Ct. at 1345-46, 1349 (same). The government (Br. 31, 44, 46) therefore acknowledges that, "as a practical reality, the Guidelines exert a significant effect on the sentences actually imposed in most cases." And the effect of the career-offender guideline is clear. In 2014, the average non-career-offender sentence was less than half of – and nearly seven years shorter than – the average sentence imposed on career offenders. Fed. Pub. & Cmty. Def. & NAFD ("Defenders") Amicus Br. 6, 2a.

The effect of § 4B1.2(a)(2)'s residual clause in particular is striking. Post-*Johnson* re-sentencings illustrate that point. Comprehensively compiled in the attached chart is every case known to Petitioner involving a defendant who: (1) had her guideline range enhanced pre-*Johnson* under § 4B1.2(a)(2)'s residual clause; (2) obtained relief under *Johnson*; and (3) has since been re-sentenced without the enhancement. App. 1-14. Of the 88 total cases identified, every defendant but one received a sentence lower than the sentence originally imposed, even though the government urged re-imposition of the same (or higher) sentence in approximately one-quarter of the cases. Moreover, the average post-*Johnson* sentence imposed was more than 3 years lower than the original sentence. And, in many cases, it was substantially lower, including in one case by 17½ years. *Id.* at 4. Thus, contrary to the government's argument (Br. 12, 15-16, 28-29), the rule here does far more than merely reduce the

guideline range; it effectively reduces the sentence itself, often substantially. That cannot be a procedural function.

Unable to dispute the rule's compelling impact, the government argues (Br. 31-32) that this impact is "not relevant to the retroactivity analysis." It asserts that this Court has previously deemed "procedural" rules that "undoubtedly" affected the outcome. To the contrary, the effect of the rules it cites could *not* be demonstrated. *See, e.g.*, *Whorton*, 549 U.S. at 418-20 (discussing uncertain effect of *Crawford v. Washington*, 541 U.S. 36 (2004)). Here, by contrast, the rule's impact is incontrovertible. And that impact reflects its substantive function: by narrowing the scope of a sentencing enhancement, the rule alters the range of conduct and class of persons punished. It therefore comfortably satisfies the "normal criteria for a substantive rule." *Welch*, 136 S. Ct. at 1267.

Resisting that "normal criteria," the government invents its own. It suggests (Br. 12-13) that a rule is substantive only if it renders a defendant ineligible for the same sentence. *Montgomery* and *Welch*, however, refute that formulation. The Court acknowledged that Montgomery remained eligible for the same life-without-parole sentence regardless of the new, substantive rule in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), if the court found him permanently incorrigible. 136 S. Ct. at 734-37. And the Court similarly acknowledged that Welch remained "eligible for [the same] 15-year sentence regardless of *Johnson*" if

his robbery offense qualified as an ACCA predicate under the elements clause. 136 S. Ct. at 1268.

The government next insists (Br. 12, 20, 24, 27-28, 31) that the rule here is procedural because it does not change the statutory range and therefore does not "delimit the bounds of a lawful sentence." If, however, altering statutory boundaries were a *sine qua non* of substantive sentencing rules, then the Court would have resolved *Welch* on that basis. But *Welch* declined to adopt that formulation, despite the government's urging. *See* Reply Brief for the United States 2, 9 & n.3, 12, 18, *Welch*, 136 S. Ct. 1257 (2016) (No. 15-6418), 2016 WL 1165972. And that was for good reason. The "bounds of a lawful [federal] sentence" are delimited not only by the statutory range, but also by the sentencing structure established by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 ("SRA"), and *Booker* and its progeny. That structure "impose[s] a series of requirements on sentencing courts that cabin the exercise of [their] discretion." *Peugh*, 133 S. Ct. at 2084.

In light of those requirements, it will be the rare case where a court can lawfully impose a sentence in the career-offender range if *Johnson* renders the defendant ineligible for that enhancement. The non-enhanced range incorporates the Commission's data and expertise, "reflect[ing] a rough approximation" of sentences that, in the "typical case," achieve the sentencing objectives mandated by Congress and codified in § 3553(a). *Rita v. United States*, 551 U.S. 338, 348-50, 357 (2007). In contrast, the Commission has found that the career-offender guideline range

generally does *not* reflect those objectives. *See* Defenders Amicus Br. 27-28. Instead, it implements the congressional mandate in 28 U.S.C. § 994(h), which is tied to the statutory maximum. That distinction explains the high rate of downward variances from the career-offender range. *Id.* at 2a.

Furthermore, because the career-offender enhancement substantially increases the guideline range in most cases, an upward variance to the enhanced range would require a "sufficiently compelling" and "significant justification," *Gall v. United States*, 552 U.S. 38, 50 (2007), "stated with specificity," 18 U.S.C. § 3553(c)(2). Such a justification, however, will rarely exist. Indeed, in the 88 post-*Johnson* re-sentencings collected by Petitioner, not a single defendant received a sentence as high as the low end of the original, enhanced range. *See* App. 1-14. This is not a fluke. In 2014, just 1.2% of non-career offenders received a sentence as high as the guideline minimum for career offenders convicted of the same type of offense. Defenders Amicus Br. 6-7, 6a-8a. In short, courts can rarely impose a career-offender sentence on someone who is not a career offender.

Petitioner's case exemplifies this dynamic. Section 4B1.2(a)(2)'s residual clause increased his guideline range from 262-to-327 months to 360-months-to-life. The district court acknowledged that, absent that enhancement, it would have been required to give him a lower sentence. JA 149. It explained that, "although the imposed 360-month sentence does not exceed the statutory maximum, such a sentence could only be

re-imposed under the SRA if the Court had a separate reason that could justify departing upward from the correct range." *Id.* Unsurprisingly, no such justification existed. Varying upward to re-impose a career-offender sentence would be "invalid," the court determined, because it would represent "a clear error of judgment . . . in weighing the Section 3553 factors." *Id.* (citation and footnote omitted). *See also United States v. Martinez*, 821 F.3d 984, 989-90 (8th Cir. 2016) (declaring "unsupported by the law" alternative sentence varying upward to non-applicable career-offender range); App. 5 (reflecting that, following *Johnson* re-sentencing on remand, Martinez received a sentence well below the career-offender range).

Therefore, *Johnson* does indeed affect the "bounds of a lawful sentence" for defendants whose sentences depended on § 4B1.2(a)(2)'s residual clause. Courts could have lawfully imposed a sentence within the career-offender range before *Johnson*, but after *Johnson* they will be unable to do so except in the rare case. In that regard, this case is analogous to *Montgomery*. Just as re-sentencing courts post-*Miller v. Alabama* can impose a sentence of life without parole only in the "rare" case where they find "permanent incorrigibility," *Montgomery*, 136 S. Ct. at 734, re-sentencing courts post-*Johnson* can impose a career-offender sentence only in the rare case where they can justify an upward variance from a guideline range typically reflecting an appropriate sentence to one that almost never does. The rule therefore "necessarily carries a significant risk that a defendant . . . faces a punishment that the

law cannot impose upon him." *Id.* at 734 (citation omitted). *Montgomery* thus confirms its substantive nature.

So too does *Miller v. Florida*, 482 U.S. 423 (1987). In unanimously holding that a retrospective increase to a presumptive sentencing guideline range violated the Ex Post Facto Clause, the Court concluded that the increase was substantive, not procedural. It reasoned that increasing the defendant's offense level "in no [way] alter[ed] the method to be followed in determining the appropriate sentence; it simply insert[ed] a larger number into the same equation," which "increas[ed] the quantum of punishment" and "directly and adversely affect[ed] the sentence." *Id.* at 433-35 (citation omitted). This Court has similarly characterized the federal Guidelines as a "substantive formula." *Peugh*, 133 S. Ct. at 2088 (citation omitted). Moreover, *Miller* rejected the argument that the guidelines there were not substantive because they "operate[d] only as a 'procedural guidepost' for the exercise of discretion within the same statutorily imposed sentencing limits." 482 U.S. at 434-35; *see id.* at 428. Given that the government advances a nearly identical argument here, *Miller* is highly instructive. *Cf. Peugh*, 133 S. Ct. at 2082-84 (relying heavily on *Miller*).

Disregarding the similarities with *Welch*, *Montgomery*, and *Miller v. Florida*, the government relies on *Lambrix* (Br. 12, 24-26), which deemed procedural *Espinosa v. Florida*, 505 U.S. 1079 (1992). But *Espinosa* is not analogous to the rule here. The government mischaracterizes *Espinosa*'s rule as prohibiting a capital

sentencer from considering a vague aggravating circumstance. That rule, however, was established in earlier decisions, and *Espinosa* took it as a "given." *Lambrix*, 520 U.S. at 528 n.3; *see Espinosa*, 505 U.S. at 1081. Instead, *Espinosa* considered whether a Florida trial judge's review of a capital jury's sentencing recommendation could "cure" the jury's consideration of a vague aggravator in the same way appellate review does. *See Lambrix*, 520 U.S. at 526, 530-31, 533-38. It answered that question negatively, concluding that the judge and jury were effectively "co-sentencers." *Id.* at 528, 533; *see Espinosa*, 505 U.S. at 1081-82. Thus, contrary to the government's characterization (Br. 24), the rule in *Espinosa* did not involve "what considerations a judge or jury may or may not take into account in imposing sentence." Rather, it "allocate[d] decisionmaking authority between judge and jury" and was therefore procedural. *Welch*, 136 S. Ct. at 1265 (citation omitted).

Equally unhelpful is the government's in-passing reliance on *Saffle* and *Beard* (Br. 26). The rule in *Saffle* related to "how" a capital jury could consider mitigating evidence (*i.e.*, without sympathy), and therefore governed "the manner" of sentencing, 494 U.S. at 490-91, a procedural function, *Schriro*, 542 U.S. at 353. So too did the rule in *Beard* – prohibiting any requirement that capital juries disregard mitigating factors not found unanimously – because it merely "govern[ed] how the sentencer considers evidence." 542 U.S. at 415-16. Unlike the rule here, neither rule narrowed the range of conduct or class of persons punished, changed

the bounds of lawful sentences, or altered the substantive formula of sentencing.

Lacking supporting precedent, the government (Br. 33-37) resorts to a hyperbolic account of the potential costs of retroactive application. But, as the government itself recently recognized, these matters have no legal relevance. *See Welch*, U.S. Reply Br. 19; Brief for the United States as Amicus Curiae 22-23, *Montgomery*, 136 S. Ct. 718 (2016) (No. 14-280), 2015 WL 4607689. Put simply, "the retroactive application of substantive rules does not implicate . . . interests in ensuring the finality of convictions and sentences." *Montgomery*, 136 S. Ct. at 732. The Court should decline the government's invitation to conduct a freewheeling cost-benefit analysis that would transform the Court into a legislature and revive the failed regime of *Linkletter v. Walker*, 381 U.S. 618 (1965).

In sum, whether the new rule is *Johnson* or its invalidation of § 4B1.2(a)(2)'s residual clause, that rule is substantive and therefore has retroactive effect here.

III. PETITIONER'S SENTENCE VIOLATED DUE PROCESS

1. The government does not dispute that Petitioner's sentence violated due process if the former commentary listing his firearms offense depended on § 4B1.2(a)(2)'s residual clause. Nor does it dispute that the residual clause is the only definition of "crime of violence" in the text of § 4B1.2(a) that this commentary could have interpreted. With the residual clause now

void for vagueness, the government is thus forced to assert (Br. 50-53 & n.6) that the commentary set forth a definition of the term "crime of violence" that was "in addition to," and "independent[] of," the definitions set forth in § 4B1.2(a)'s text. However, on that understanding, the commentary would be "inconsistent" with the text and therefore invalid under *Stinson v. United States*, 508 U.S. 36, 38, 45 (1993).

That is so because former § 4B1.2(a)'s text set forth three exclusive definitions of the term "crime of violence." It stated, "[t]he term 'crime of violence' *means* any offense" that: 1) falls within the elements clause in § 4B1.2(a)(1); 2) is an offense enumerated in § 4B1.2(a)(2); or 3) satisfies the residual clause (emphasis added). By using the word "means" rather than "includes," the text excluded any other definitions of the term "crime of violence." *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2170 (2012); *Burgess v. United States*, 553 U.S. 124, 130 (2008).[6] Therefore, if the commentary was not interpreting one of these three exclusive definitions, "then it [wa]s in effect *adding to* the definition. And that's *necessarily* inconsistent with the text of the guideline itself." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (unanimous); *accord United States v. Soto-Rivera*, 811 F.3d 53, 59-62 (1st Cir. 2016);

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[6] Notably, the Commission has used the word "includes" in the text of other guidelines. *See, e.g.*, U.S.S.G. §§ 4A1.1(d), 5E1.2(d), 5G1.3(a), 5H1.4, 6A1.2(b).

United States v. Bell, ___ F.3d ___, 2016 WL 6311084, at *3-4 (8th Cir. Oct. 28, 2016).

Accepting the government's view, then, would mean that the Commission flouted *Stinson* by including an additional, independent definition of "crime of violence" in the commentary. That is implausible. Almost immediately after *Stinson*, the Commission recognized that its commentary must interpret or explain a guideline's text. U.S.S.G. app. C, amend. 498 (1993). And when the Commission amended § 4B1.2(a)'s commentary over a decade later to include Petitioner's firearms offense, it expressly relied on judicial decisions interpreting the residual clause. U.S.S.G. app. C, amend. 674 (2004) (Reason for Amendment). The Court should presume that, by expressly connecting the commentary to that textual definition, the Commission sought to abide by *Stinson*'s established holding.

In any event, whatever the Commission's intent, the commentary was legally valid under *Stinson* – and thus capable of increasing Petitioner's sentence – only as an interpretation of § 4B1.2(a)(2)'s residual clause. Under the SRA, the Guidelines are promulgated pursuant to "an express congressional delegation for rulemaking," *Stinson*, 508 U.S. at 44, *see* 28 U.S.C. § 994(x), and must be approved by Congress, 28 U.S.C. § 994(p), so as to ensure that "the Commission is fully accountable to Congress," *Mistretta v. United States*, 488 U.S. 361, 393 (1989). The commentary, by contrast, is neither subject to notice-and-comment rulemaking nor "reviewed by Congress." *Stinson*, 508 U.S. at 46. It is for that reason that the commentary is valid only if it

"interprets" or "explains" a guideline's text. *See id.* at 44-46. Affording the commentary legal force independent of the text would conflict with the SRA, permit the Commission to make law without oversight, and remove structural safeguards ensuring the Commission's compliance with the separation of powers. *Mistretta*, 488 U.S. at 393-94.

Consequently, the commentary's validity depended on § 4B1.2(a)(2)'s vague residual clause. Relying on the commentary to enhance Petitioner's sentence therefore violated due process.

2. The government alternatively argues (Br. 55-57) that, even if the commentary depended on § 4B1.2(a)(2)'s residual clause, that clause is not vague "as applied" to Petitioner because the commentary identified his offense. *Johnson*, however, jettisoned that as-applied analysis over the strenuous objections of the government and dissent. 135 S. Ct. at 2560-61; *see id.* at 2580-82 (Alito, J., dissenting); Supplemental Brief for the United States 11, 15-16, 18-19, 38, *Johnson*, 135 S. Ct. 2551 (2015) (No. 13-7120), 2015 WL 1284964. The Court explained: "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2560-61. Accordingly, the Court invalidated the ACCA's residual clause "in all its applications." *Id.* at 2561.

The government (Br. 14, 53-57) attempts to distinguish *Johnson* on the ground that, unlike § 4B1.2(a)(2), the ACCA's residual clause lacked an authoritative clarifying construction. But that overlooks this Court's four pre-*Johnson* decisions seeking to do just that. *See id.* at 2558-60. Like the commentary, those decisions expressly identified specific offenses satisfying the ACCA's residual clause (or not), absolving the public and lower courts from consulting the vague text in those instances. *E.g.*, *Sykes v. United States*, 564 U.S. 1 (2011) (Indiana vehicle flight); *James v. United States*, 550 U.S. 192 (2007) (Florida attempted burglary). Yet *Johnson* did not exempt these offenses from its facial holding. Despite the Court's best efforts, there was no construction of the residual clause capable of clarifying its meaning. Just as the ACCA's residual clause was impossible to interpret, so too is § 4B1.2(a)(2)'s identical residual clause.

Straying far from *Johnson*, the government cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), and *Bell v. Cone*, 543 U.S. 447 (2005), to argue that the Court must first consider clarifying constructions before invalidating vague text on its face. However, each of those cases involved clarifying constructions of vague *state*-law provisions. Federal courts are conclusively bound in every instance by a state-court or state-agency's construction of state law. *See Hoffman Estates*, 455 U.S. at 494 n.5; *Cramp v. Bd. of Pub. Instruction of Orange Co., Fla.*, 368 U.S.

278, 279-80 (1961). This case, of course, involves only federal law.

Unaided by federalism, the government obliquely hints (Br. 56) that, just as the Court sometimes defers to agency interpretations, it should likewise "take account of" the Commission's interpretation of § 4B1.2(a)(2)'s residual clause. But even if traditional administrative-law principles applied with full force to the Commission, a dubious proposition given its *sui generis* status, no deference would be warranted here. That is so because the commentary was not interpreting the Commission's own words; rather, § 4B1.2(a)(2)'s residual clause merely "parrot[ed]" back the identical language of the ACCA, *Gonzales v. Oregon*, 546 U.S. 243, 256-58 (2006), a statute that Congress did not "entrust [the Commission] to administer," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Furthermore, § 4B1.2(a)(2)'s residual clause is not ambiguous (*i.e.*, capable of multiple, ascertainable meanings). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Rather, *Johnson* declared the residual clause so "hopeless[ly] indetermina[te]" that its meaning is impossible to ascertain. 135 S. Ct. at 2558. Because this Court could not derive meaning from this text, neither could the Commission. Indeed, when this Court determines a statute's unambiguous meaning (or, here, lack thereof), the Commission may not offer a contrary one. *See United States v. LaBonte*, 520 U.S. 751, 757-62 (1997).

That is particularly true here, because the Commission "did not take account of empirical data and national experience" when interpreting § 4B1.2(a)(2)'s residual clause to include Petitioner's firearms offense in the commentary. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (citation omitted). Quite the contrary, it merely looked to lower-court opinions interpreting the residual clause and the National Firearms Act. U.S.S.G. app. C, amend. 674 (2004) (Reason for Amendment); *see* Pet. Br. 50. *Johnson* declared that sort of pure legal analysis impossible. And it did so when considering the same firearms offense at issue here, an offense for which "the residual clause yield[ed] no answers." *Johnson*, 135 S. Ct. at 2559.

Just as this Court could not save the ACCA's residual clause from facial invalidation, the Commission cannot save § 4B1.2(a)(2)'s identical, derivative text from that same fate. It too is void in its entirety.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender
JANICE L. BERGMANN*
ANDREW L. ADLER
Assistant Federal
Public Defenders

OFFICE OF THE FEDERAL
PUBLIC DEFENDER
One East Broward Boulevard
Suite 1100
Fort Lauderdale, FL 33301
(954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

**Counsel of Record*

Date: November 21, 2016

RE-SENTENCINGS AFTER *JOHNSON**

CAREER OFFENDER CASES (45)

1st Cir.	***United States v. Soto-Rivera***, 811 F.3d 53 (1st Cir. 2016) No. 3:13-cr-0463 (D.P.R.)	**Direct appeal**	**92-115 mos.**	**108 mos.**	**70-87 mos.**	**87 mos.**	**Lower by 21 mos.**
₸	*Stampley v. United States*, No. 1:11-cr-10302, 2016 WL 4727136 (D. Mass. Sept. 9, 2016)	§ 2255	151-188 mos.	60 mos.	24-30 mos.	30 mos.	Lower by 30 mos.
	United States v. Aponte, No. 11-cr-30018 (D. Mass. Sept. 22, 2016)	§ 2255	262-327 mos.	102 mos. (42 mos. + 60 mos.**)	75-81 mos. (15-21 mos. + 60 mos.)	75 mos. (15 mos. + 60 mos.)	Lower by 27 mos.
	United States v. Ramirez, No. 1:10-cr-10008, ___ F. Supp. 3d ___, 2016 WL 3014646 (D. Mass. May 24, 2016)	§ 2255	151-188 mos.	144 mos.	37-46 mos.	Time served (approx. 72 mos.)	Lower by 72 mos.

* This chart compiles every case known to Federal Defenders in which: (1) the defendant's applicable guideline range was previously enhanced based on a prior or instant conviction deemed a "crime of violence" under the residual clause in U.S.S.G. § 4B1.2(a)(2); (2) the defendant obtained relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (3) the defendant has been re-sentenced as of October 28, 2016. Cases were identified by surveying all Federal Defender offices nationwide and by tracking references to *Johnson* in Westlaw and Lexis databases. When possible, case citations are to reported decisions; otherwise, cases are identified by the district court case name and criminal docket number. The date given refers to the date on which the appellate court or district court applied *Johnson* to the defendant's guideline sentence. In some circuits, there have been no re-sentencings due to circuit precedent, timing, and/or stays pending the outcome in this case. Information regarding the applicable guideline ranges and sentences imposed was obtained from written court decisions, sentencing transcripts, judgments and amended judgments, briefs, other court filings as available through PACER, and in some instances from defense counsel.

** Denotes a consecutive sentence for a conviction under 18 U.S.C. § 924(c).

₸ Denotes that, at re-sentencing, the government asked the court to re-impose the original sentence or higher.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. Vasquez, No. 4:12-cr-40010 (D. Mass. Sept. 26, 2016)	§ 2255	188-235 mos.	84 mos.	46-57 mos. (w/ 60 mo. stat. min.)	Time served (approx. 57 mos.)	Lower by 27 mos.
2d Cir.	*United States v. Snell*, No. 14-178 (2d Cir. Aug. 18, 2015) No. 5:11-cr-363 (N.D.N.Y.)	Direct appeal	210-262 mos. (w/ 240 mo. stat. max.)	210 mos.	100-125 mos.	120 mos.	Lower by 90 mos.
₮	*Petrillo v. United States*, 147 F. Supp. 3d 9 (D. Conn. 2015) (No. 3:05-cr-00312)	§ 2255	188-235 mos.	188 mos.	151-188 mos.	151 mos.	Lower by 37 mos.
₮	*United States v. Velasquez*, No. 08-cr-56 (E.D.N.Y. Aug. 4, 2016)	§ 2255	188-235 mos.	160 mos.	70-87 mos.	Time served (approx. 108 mos.)	Lower by 52 mos.
	Williams v. United States, No. 1:07-cr-00238 (W.D.N.Y. Apr. 18, 2016)	§ 2255	262-327 mos.	156 mos.	51-63 mos. (estimated)	Time served (approx. 114 mos.)	Lower by 42 mos.
3d Cir.	*United States v. Calabretta*, 831 F.3d 128 (3d Cir. 2016) No. 2:12-cr-00131 (D.N.J.)	Direct appeal	188-235 mos.	120 mos.	108-135 mos.	100 mos.	Lower by 20 mos.
	United States v. Gamble, No. 15-1760 (3d Cir. Dec. 31, 2015) No. 1:13-cr-00047 (M.D. Pa.)	Direct appeal	168-210 mos.	126 mos.	27-33 mos.	51 mos.	Lower by 75 mos.

	United States v. Nerius, No. 14-4121, 2015 U.S. App. LEXIS 23093 (3d Cir. Aug. 26, 2015) No. 4:13-cr-00171 (M.D. Pa.)	Direct appeal	37-46 mos.	37 mos.	30-37 mos.	36 mos.	Lower by 1 mo.
₮	*United States v. Townsend*, 638 F App'x 172 (3d Cir. 2015) No. 2:12-cr-125 (W.D. Pa.)	Direct appeal	360 mos.-life	200 mos.	135-168 mos.	200 mos.	Same
	United States v. Anker, No. 2:14-cr-00144, 2016 WL 4480054 (W.D. Pa. Aug. 25, 2016)	§ 2255	151-188 mos.	30 mos.	24-30 mos.	Time served (approx. 17 mos.)	Lower by 13 mos.
	United States v. Boone, No. 2:12-cr-00162, 2016 WL 3057655 (W.D. Pa. May 31, 2016)	§ 2255	151-188 mos.	120 mos.	30-37 mos.	Time served (approx. 27 mos.)	Lower by 93 mos.
	United States v. Dates, No. 2:06-cr-83 (W.D. Pa. Oct. 6, 2016)	§ 2255	262-327 mos.	151 mos.	84-105 mos.	84 mos.	Lower by 67 mos.
	United States v. Evans, No. 1:02-cr-01, 2015 WL 9480097 (W.D. Pa. Dec. 29, 2015)	§ 2255	188-235 mos.	205 mos.	57-71 mos.	Time served (approx. 153 mos.)	Lower by 52 mos.
	United States v. Joseph Mack, No. 2:10-cr-00233 (W.D. Pa. Aug. 29, 2016)	§ 2255	188-235 mos.	130 mos.	57-71 mos. (w/ 60 mo. stat. min.)	Time served (approx. 68 mos.)	Lower by 62 mos.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. McColley, No. 1:07-cr-45, 2016 WL 1156520 (W.D. Pa. Mar. 24, 2016)	§ 2255	77-96 mos.	84 mos.	30-37 mos.	36 mos. (effective)	Lower by 48 mos.
	United States v. Milligan, No. 2:11-cr-224 (W.D. Pa. Aug. 4, 2016)	§ 2255	262-327 mos.	110 mos.	120-150 mos.	Time served (approx. 63 mos.)	Lower by 47 mos.
	United States v. Erskine Smith, No. 2:92-cr-146 (W.D. Pa. Aug. 25, 2016)	§ 2255	360 mos.-life	360 mos.	135-168 mos.	150 mos.	Lower by 210 mos.
	United States v. Strickler, No. 2:11-cr-158 (W.D. Pa. Aug. 8, 2016)	§ 2255	151-188 mos.	87 mos.	37-46 mos.	Time served (approx. 51 mos.)	Lower by 36 mos.
5th Cir.	*United States v. Estrada*, No. 15-40264 (5th Cir. Oct. 27, 2015) No. 2:14-cr-681-1 (S.D. Tex.)	Direct appeal	188-235 mos.	188 mos.	77-96 mos.	120 mos.	Lower by 68 mos.
	United States v. Williams, No. 7:11-cr-0036 (W.D. Tex. Apr. 27, 2016)	§ 2255	151-188 mos.	151 mos.	24-30 mos. (estimated)	24 mos.	Lower by 127 mos.
6th Cir.	*United States v. Caldwell*, 650 F. App'x 257 (6th Cir. 2016) No. 1:14-cr-58 (N.D. Ohio)	Direct appeal	292-365 mos.	292 mos. (208 mos. + 84 mos.)	84-105 mos. + 84 mos.	244 mos. (160 mos. + 84 mos.)	Lower by 48 mos.

T	***United States v. Carpenter***, No. 15-3192 (6th Cir. Aug. 21, 2015) No. 1:14-cr-317 (N.D. Ohio)	Direct appeal	151-188 mos.	130 mos.	92-115 mos.	115 mos.	Lower by 15 mos.
	United States v. Darden, 605 F. App'x 545 (6th Cir. 2015) No. 6:11-cr-00036 (E.D. Ky.)	Direct appeal	151-188 mos.	144 mos.	110-137 mos.	120 mos.	Lower by 24 mos.
	United States v. Harbin, 610 F. App'x 562 (6th Cir. 2015) No. 5:14-cr-00074 (N.D. Ohio)	Direct appeal	188-235 mos.	110 mos.	21-27 mos.	27 mos.	Lower by 83 mos.
8th Cir.	*United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016) No. 4:14-cr-3049 (D. Neb.)	Direct appeal	262-327 mos.	262 mos.	120-125 mos.	180 mos.	Lower by 82 mos.
	United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) No. 4:13-cr-0142 (E.D. Ark.)	Direct appeal	37-46 mos.	37 mos.	27-33 mos.	18 mos.	Lower by 19 mos.
9th Cir.	*United States v. Colino*, No. 15-50102 (9th Cir. Nov. 16, 2015) No. 2:14-cr-359 (C.D. Cal.)	Direct appeal	188-235 mos.	112 mos.	70-87 mos.	70 mos.	Lower by 42 mos.

T	***United States v. Lee*, 821 F.3d 1124 (9th Cir. 2016)** **No. 3:09-cr-193 (N.D. Cal.)**	**Direct appeal**	**360 mos.-life**	**120 mos.**	**84-105 mos.**	**96 mos.**	**Lower by 24 mos.**
	United States v. Armstrong, No. 3:11-cr-290 (D. Or. Aug. 24, 2016)	§ 2255	151-188 mos.	120 mos.	57-71 mos.	Time served (approx. 60 mos.)	Lower by 60 mos.
	United States v. Dietrick, No. 2:11-cr-253 (W.D. Wash. Aug. 18, 2016)	§ 2255	92-115 mos.	92 mos.	33-41 mos.	Time served (approx. 55 mos.)	Lower by 37 mos.
	United States v. Gentry, __ F Supp. 3d. __, 2016 WL 3647331 (D. Or. July 7, 2016) No. 3:12-cr-604-SI (D. Or.)	§ 2255	188-235 mos.	120 mos.	120-150 mos.	70 mos.	Lower by 50 mos.
	United States v. Gibson, No. 3:98-cr-05426, 2016 WL 3349350 (W.D. Wash. June 15, 2016)	§ 2255	248-295 mos. (188-235 mos. + 60 mos.)	248 mos. (188 mos + 60 mos.)	137-156 mos. (77-96 mos. + 60 mos.)	Time served (approx. 210 mos.)	Lower by 38 mos.
	United States v. Hoopes, __ F Supp. 3d __, 2016 WL 3638114 (D. Or. July 5, 2016) No. 3:11-cr-425-HZ (D. Or.)	§ 2255	151-188 mos.	100 mos.	57-71 mos.	71 mos.	Lower by 29 mos.
	United States v. Jennings, No. 2:12-cr-292 (W.D. Wash. Aug. 17, 2016)	§ 2255	151-188 mos.	96 mos.	63-78 mos.	51 mos.	Lower by 45 mos.

Circuit	Case	Direct Appeal or § 2255	Career Offender Range	Original Sentence Imposed	Non-Career Offender Range	Sentence Imposed at Resentencing	Relationship to Original Sentence
	United States v. Rios, No. 2:11-cr-0197-RMP (E.D. Wash. June 24, 2016)	§ 2255	188-235 mos.	120 mos.	77-96 mos.	77 mos.	Lower by 43 mos.
	United States v. Stamps, No. 4:13-cr-238, 2016 WL 3747286 (N.D. Cal. June 29, 2016)	§ 2255	151-188 mos.	120 mos.	77-96 mos.	72 mos.	Lower by 48 mos.
	United States v. Teeples, No. 9:02-cr-45, 2016 WL 4147139 (D. Mont. Aug. 3, 2016)	§ 2255	188-235 mos.	211 mos.	78-97 mos.	87 mos.	Lower by 124 mos.
	United States v. West, No. 14-cr-0066 (E.D. Wash. July 22, 2016)	§ 2255	151-188 mos.	111 mos., 15 days	57-71 mos.	75 mos., 15 days	Lower by 36 mos.
10th Cir.	*United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) No. 5:13-cr-03361 (D.N.M.)	Direct appeal	188-235 mos.	188 mos.	92-115 mos.	70 mos.	Lower by 118 mos.
	United States v. Smith, 628 F. App'x 565 (10th Cir. 2015) No. 1:14-cr-1136 (D.N.M.)	Direct appeal	188-235 mos.	120 mos.	63-78 mos.	63 mos.	Lower by 57 mos.
	United States v. Daugherty, No. 4:07-cr-0087, 2016 WL 4442801 (N.D. Okla. Aug. 22, 2016)	§ 2255	130-162 mos.	130 mos.	84-105 mos.	Time served (approx. 112 mos.)	Lower by 18 mos.

U.S.S.G. § 2K2.1 CASES (43)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Relationship to Original Sentence
1st Cir. ₸	*United States v. Fields*, 823 F.3d 20 (1st Cir. 2016) No. 1:13-cr-10097 (D. Mass.)	Direct appeal	70-87 mos.	60 mos.	37-46 mos.	Time served (approx. 46 mos.)	Lower by 14 mos.
	United States v. Pagán-Soto, No. 13-2243 (1st Cir. Aug. 27, 2015) No. 3:13-cr-223 (D.P.R.)	Direct appeal	70-87 mos.	96 mos.	24-30 mos.	36 mos.	Lower by 60 mos.
2d Cir. ₸	*United States v. Herring*, No. 14-3194 (2d Cir. Aug. 18, 2015) No. 1:13-cr-136 (D. Vt.)	Direct appeal	37-46 mos.	24 mos.	21-27 mos.	Time served (approx. 17 mos.)	Lower by 7 mos.
3d Cir.	*United States v. Mekail Jones*, No. 1:11-cr-42 (W.D. Pa. Oct. 14, 2016)	§ 2255	70-87 mos.	76 mos.	46-57 mos.	52 mos.	Lower by 24 mos.
6th Cir.	*United States v. Chin*, No. 15-5448 (6th Cir. Jan. 26, 2016) No. 1:13-cr-00091 (E.D. Tenn.)	Direct appeal	37-46 mos.	42 mos.	21-27 mos.	Time served (approx. 28 mos.)	Lower by 14 mos.
	United States v. Grayer, 625 F. App'x 313 (6th Cir. 2015) No. 1:13-cr-10051 (W.D. Tenn.)	Direct appeal	92-115 mos.	84 mos.	51-63 mos.	47 mos.	Lower by 37 mos.

∓	***United States v. Pawlak***, 822 F.3d 902 (6th Cir. 2016) No. 1:14-cr-0305 (N.D. Ohio)	**Direct appeal**	**121-151 mos.**	**105 mos.**	**84-105 mos.**	**71 mos.**	**Lower by 34 mos.**
8th Cir.	*United States v. Beck*, 2016 WL 3676191 (D. Neb. July 6, 2016) No. 8:13-cr-62 (D. Neb.)	§ 2255	110-120 mos.	110 mos.	77-96 mos.	77 mos.	Lower by 33 mos.
	United States v. Hawkins, No. 8:13-cr-00343, 2016 WL 3645154 (D. Neb. June 30, 2016)	§ 2255	63-78 mos.	75 mos.	33-41 mos.	41 mos.	Lower by 34 mos.
9th Cir.	*United States v. Benavides*, 617 F. App'x 790 (9th Cir. 2015) No. 4:13-cr-0718 (N.D. Cal.)	Direct appeal	84-105 mos.	87 mos.	30-37 mos.	35 mos.	Lower by 52 mos.
	United States v. Haycock, 652 F. App'x 531 (9th Cir. 2016) (No. 14-30152) No. 4:13-cr-251 (D. Idaho)	Direct appeal	37-46 mos.	40 mos.	21-27 mos.	Time served (approx. 18 mos.)	Lower by 22 mos.
∓	*United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 24, 2015) No. 4:13-cr-00381 (N.D. Cal.)	Direct appeal	30-37 mos.	33 mos.	15-21 mos.	18 mos.	Lower by 15 mos.

₸	***Pressley v. United States***, __ F. Supp. 3d __, 2016 WL 4440672 (W.D. Wash. Aug. 11, 2016) (No. 2:12-cr-318)	§ 2255	84-105 mos.	120 mos.	46-57 mos.	60 mos.	Lower by 60 mos.
	United States v. Acoba, No. 3:12-cr-5343, 2016 WL 4611546 (W.D. Wash. Sept. 6, 2016)	§ 2255	70-87 mos.	70 mos.	37-46 mos.	Time served (50 mos.)	Lower by 20 mos.
₸	*United States v. Arredondo*, No. 2:12-cr-2084, 2016 WL 3448596 (E.D. Wash. June 20, 2016)	§ 2255	51-63 mos.	55 mos.	30-37 mos.	37 mos.	Lower by 18 mos.
₸	*United States v. Benard*, No. 3:12-cr-780, 2016 WL 5393939 (N.D. Cal. Sept. 27, 2016)	§ 2255	70-87 mos.	52 mos.	46-57 mos.	46 mos.	Lower by 6 mos.
	United States v. Bercier, __ F. Supp. 3d __, 2016 WL 3619638 (E.D. Wash. June 24, 2016) No. 2:13-cr-102 (E.D. Wash.)	§ 2255	51-63 mos.	51 mos.	30-37 mos.	37 mos.	Lower by 14 mos.
₸	*United States v. Castilleja*, No. 2:12-cr-2040 (E.D. Wash. June 24, 2016)	§ 2255	63-78 mos.	63 mos.	33-41 mos.	Time served (approx. 52 mos.)	Lower by 11 mos.

	United States v. Cloud, No. 2:10-cr-2077, ___ F Supp. 3d ___, 2016 WL 3647785 (E.D. Wash. June 24, 2016)	**§ 2255**	**110-137** mos.	**150 mos.**	**70-87 mos.**	**Time served** (approx. 72 mos.)	**Lower by 78** mos.
	United States v. Dean, 169 F. Supp. 3d 1097 (D. Or. Mar. 15, 2016) (No. 3:13-cr-137)	§ 2255	63-78 mos.	60 mos. concurrent w/undis-charged sentence	27-33 mos.	51 mos. (effective; 27 mos. consec. to 24 mos. undischarged sentence)	Lower by 9 mos. (effective)
₮	*United States v. Dockins*, No. 2:13-cr-2039, 2016 WL 4414790 (E.D. Wash. Aug 18, 2016)	§ 2255	92-115 mos.	77 mos.	33-41 mos.	Time served (approx. 51 mos.)	Lower by 26 mos.
₮	*United States v. Edmondson*, No. 2:13-cr-0144 (E.D. Wash. July 5, 2016)	§ 2255	92-115 mos.	120 mos.	63-78 mos.	78 mos.	Lower by 42 mos.
₮	*United States v. Espinoza*, No. 2:13-cr-769 (C.D. Cal. Sept. 21, 2016)	§ 2255	51-63 mos.	37 mos.	30-37 mos.	30 mos.	Lower by 7 mos.
₮	*United States v. Garcia*, __ F. Supp. 3d __, 2016 WL 4364438 (N.D. Cal. Aug. 16, 2016) (No. 4:13-cr-601)	§ 2255	37-46 mos.	30 mos.	18-24 mos.	21 mos.	Lower by 9 mos.
	United States v. Hotchkiss, No. 3:14-cr-00198, 2016 WL 4761780 (S.D. Cal. Sept. 13, 2016)	§ 2255	51-63 mos.	46 mos.	27-33 mos.	Time served (approx. 33 mos.)	Lower by 13 mos.

	United States v. Ortega, 2:11-cr-0087 (E.D. Wash. July 1, 2016)	§ 2255	92-115 mos.	120 mos.	51-63 mos.	65 mos.	Lower by 55 mos.
	United States v. Parker, No. 2:14-cr-211, 2016 WL 4418007 (W.D. Wash. Aug. 19, 2016)	§ 2255	46-57 mos.	38 mos.	37-46 mos.	Time served (approx. 26 mos.)	Lower by 12 mos.
₮	*United States v. Plumlee*, No. 2:10-cr-2037-RMP (E.D. Wash. June 24, 2016)	§ 2255	130-162 mos.	108 mos.	92-115 mos.	72 mos.	Lower by 36 mos.
	United States v. Rios, __ F. Supp. 3d __, 2016 WL 4472996 (E.D. Wash. Aug. 12, 2016) (No. 2:13-cr-2059)	§ 2255	51-63 mos.	60 mos.	30-37 mos.	Time served (approx. 44 mos.)	Lower by 16 mos.
	United States v. Robinson, No. 2:13-cr-0079-RMP (E.D. Wash. July 1, 2016)	§ 2255	110-120 mos.	107 mos.	41-51 mos.	13 mos. (51 mos. less 38 mos. for state time served)	Lower by 56 mos. (effective)
	United States v. Santos, No. 2:11-cr-566, 2016 WL 5661553 (C.D. Cal. Sept. 9, 2016)	§ 2255	92-115 mos.	84 mos.	51-63 mos.	Time served (approx. 64 mos.)	Lower by 20 mos.
₮	*United States v. Suttle*, No. 2:14-cr-00083, 2016 WL 3448598 (E.D. Wash. June 20, 2016)	§ 2255	37-46 mos.	87 mos.	18-24 mos.	30 mos.	Lower by 57 mos.

	United States v. Tomisser, __ F. Supp. 3d __, 2016 WL 3774128 (E.D. Wash. July 12, 2016) (No. 2:11-cr-2115)	§ 2255	63-78 mos.	78 mos.	33-41 mos.	Time served (approx. 57 mos.)	Lower by 21 mos.
10th Cir.	*United States v. Goodwin*, 625 F. App'x 840 (10th Cir. 2015) No. 1:12-cr-00100 (D. Colo.)	Direct appeal	110-137 mos. (w. 120 mo. stat. max.)	99 mos.	63-78 mos.	57 mos.	Lower by 42 mos.
	United States v. Porter, 643 F. App'x 758 (10th Cir. 2016) No. 1:14-cr-00187 (D. Colo.)	Direct appeal	92-115 mos.	96 mos.	63-78 mos.	78 mos.	Lower by 18 mos.
	Andrews v. United States, No. 2:12-cr-00616, 2016 WL 4734593 (D. Utah Sept. 9, 2016)	§ 2255	57-71 mos.	51 mos.	30-37 mos. [estimated]	33 mos.	Lower by 18 mos.
	Culp v. United States, No. 2:11-cr-293, 2016 WL 5400395 (D. Utah Sept. 27, 2016)	§ 2255	70-87 mos.	75 mos.	57-71 mos.	Time served (approx. 54 mos.)	Lower by 21 mos.
	United States v. Alderman, No. 2:12-cr-00661 (D. Utah Aug. 30, 2016)	§ 2255	63-78 mos.	66 mos.	33-41 mos.	41 mos.	Lower by 25 mos.
	United States v. Archer, No. 2:14-cr-00334 (D. Utah July 22, 2016)	§ 2255	70-87 mos.	30 mos.	24-30 mos.	24 mos.	Lower by 6 mos.

	United States v. Berrett, 1:13-cr-00004 (D. Utah Oct. 19, 2016)	§ 2255	77-96 mos.	48 mos.	51-63 mos.	Time served (approx. 45 mos.)	Lower by 3 mos.
	United States v. Bumgarner, No. 2:11-cr-00312 (D. Utah Sept. 14, 2016) Order entered in No. 2:16-cv-699 (Sept. 28, 2016)	§ 2255	51-63 mos.	56 mos.	30-37 mos.	37 mos.	Lower by 19 mos.
	United States v. Durete, __ F Supp. 3d __, 2016 WL 5791199 (D. Colo. Sept. 13, 2016) (No. 1:14-cr-71)	§ 2255	77-96 mos.	70 mos.	37-46 mos.	40 mos.	Lower by 30 mos.
	United States v. Mendez, No. 1:10-cr-37 (D. Utah. Aug. 26, 2016) Order entered in No. 1:16-cv-00053 (Oct. 24, 2016)	§ 2255	135-168 (w. 120 mo. stat. max.)	96 mos.	77-96 mos.	77 mos.	Lower by 19 mos.

REPLY BRIEF

Supreme Court, U.S.
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No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Contrary to the arguments presented by the Court-Appointed Amicus, the advisory Sentencing Guidelines are subject to "the Constitution's prohibition of vague criminal laws," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015). The calculation of the benchmark Guidelines range serves as the lodestar of the sentencing process, including appellate review, and exerts a substantial effect on the actual sentences imposed in most cases. The federal sentencing system gives the Guidelines range that role precisely because the range is understood to reflect the considered judgment of the expert Sentencing Commission, informed by congressional policy, about the appropriate range of punishment in light of a defendant's offense conduct and criminal history. But if a guideline is so "shapeless" that it is impossible to "derive meaning" from it, *id.* at 2560, the resulting range reflects nothing more than the judge's "guesswork" about what the

Commission recommended, *ibid.* (citation omitted). Using such an arbitrarily derived numerical range in the sentencing process, with the substantial effect the range typically exerts on the sentence imposed, denies a defendant due process in his sentencing proceeding.

In arguing that the Guidelines are exempt from vagueness scrutiny, amicus makes two main arguments, but neither has merit. First, amicus argues that because due process permits a purely discretionary sentencing scheme, it must also permit a scheme in which the judge's discretion is anchored at the outset to an arbitrarily determined benchmark range. That does not follow. An inscrutably vague guideline injects an element of arbitrariness into the sentencing process that is not found in a discretionary sentencing system that relies on individualized judicial judgment exercised in light of particular facts. In the advisory Guidelines system, a sentencing judge is legally compelled to treat the Guidelines range as the view of the expert Sentencing Commission, and to consider that range in the sentencing process. When a fatally vague guideline makes it impossible to know what the Sentencing Commission recommended, that process becomes arbitrary. Just as it would violate due process to choose the benchmark range by flipping a coin, calculating that range on the basis of a legal text from which it is impossible to "derive meaning" offends the right to a procedurally fair sentencing proceeding.

Second, amicus argues that this Court has struck down as vague only laws that "regulate private conduct" (Br. 12), by which he appears to mean laws that define crimes. This Court held in *Johnson*, however, that the vagueness doctrine applies equally to "statutes fixing sentences," 135 S. Ct. at 2557, so that dis-

tinction is incorrect. More importantly, this Court has never considered the procedural problem presented here: not that the statute fails to clearly define what conduct is proscribed or what the statutorily authorized sentencing range is, but rather that a vague guideline infects the sentencing process with a numerical range that the judge must consider as the Commission's expert view although it is calculated based on an incurably indeterminate legal provision. Amicus never explains how a sentencing proceeding that unfolds from such an arbitrarily determined starting point—a starting point that in most cases exerts a significant effect on the actual sentence imposed—can satisfy due process.

A. A Vague Guideline Violates Due Process Because An Important Sentencing Factor Is Determined Arbitrarily

1. As the government has explained in its opening brief (at 40-46), two intrinsic features of the advisory Sentencing Guidelines give rise to the due process problem with applying a vague guideline. First, the calculation of the advisory Guidelines range anchors and structures the sentencing process. The district court must correctly calculate the range—a miscalculation is a "significant procedural error"—and the parties' arguments largely key off of the range. *Gall* v. *United States*, 552 U.S. 38, 51 (2007). Because that range is understood to reflect the Sentencing Commission's expert recommendation in light of the defendant's offense conduct and criminal history, a district court must provide a greater justification for a sentence imposed outside the range, and an appellate court may presume that a within-Guidelines sentence is reasonable. *Ibid.* The Guidelines range thus "anchor[s] both the district court's discretion and the

appellate review process." *Peugh* v. *United States*, 133 S. Ct. 2072, 2087 (2013).

Second, calculating the Guidelines range does not involve an exercise of traditional sentencing discretion by the district court. The court does not at the Guidelines-range-calculation stage determine an appropriate sentence in light of all the relevant factors. Rather, calculating the starting benchmark range requires applying a legal text to particular facts. Defendants with the same offense conduct and the same criminal history are supposed to be assigned the same benchmark range. In that respect, calculation of the Guidelines range differs fundamentally from the district court's ultimate exercise of sentencing discretion under 18 U.S.C. 3553(a), which sets out the full array of general factors relevant to discretionary sentencing.

In light of those two features of the sentencing regime in place since *United States* v. *Booker*, 543 U.S. 220 (2005), a vague guideline violates a defendant's due process right to a procedurally fair sentencing proceeding. The reason that the range anchors the sentencing process is that courts understand it to reflect the considered judgment of the Sentencing Commission, informed by congressional policies. But when a guideline's text is so indeterminate that it cannot satisfy the criminal-law vagueness standard, it is impossible for the court to determine what in fact the Commission recommended—whether, for example, the Commission intended a particular offense to qualify as a "crime of violence." As a result, a Guidelines range based on a vague guideline reflects linguistic "guesswork," not reasoned application of factors relevant to determining a just and reasonable

sentence. *Johnson*, 135 S. Ct. at 2560 (citation omitted). And that procedural unfairness is magnified by the substantial effect that the Guidelines range exerts on the ultimate sentence imposed in most cases. See *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016). For those reasons, anchoring the sentencing proceeding to such an arbitrarily determined factor offends due process.

2. Amicus seems to acknowledge (Br. 20-22) that the Court's established sentencing framework, under which the Guidelines range is the "lodestar" of the sentencing process and appellate review, *Molina-Martinez*, 136 S. Ct. at 1346, gives rise to a significant procedural problem when a vague guideline is used to calculate the range. But his response to that problem is to suggest that this Court's "post-*Booker* structure" has been ill-conceived, because "no particular sequence" is "prescribed by the statute or the *Booker* remedial opinion" and "*Booker* placed no specific emphasis on the Guidelines over any other factor." Amicus Br. 21-22. Amicus questions whether "these refinements would exist had the vagueness argument presented itself first," and for that reason deems it "remarkable" that the government relies on those features of the established sentencing regime to show why a vague guideline creates fundamental procedural unfairness. *Id.* at 22.

Amicus's attack on this Court's settled sentencing framework should be rejected. For nearly a decade this Court has held that the Guidelines range plays a procedural role of overriding importance in the sentencing process. See *Gall*, 552 U.S. at 49-50. That recognition flows from the emphasis in *Booker* itself on the role that the Commission's expertise, and the

advisory Guidelines system, would play in achieving Congress's objective of "avoid[ing] excessive sentencing disparities." 543 U.S. at 264-265. Although amicus sees the advisory range as no different from any other factor that a sentencing judge considers, this Court has reached the opposite conclusion, explaining that "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing." *Peugh*, 133 S. Ct. at 2084. The Guidelines serve that central role because they reflect the views of the Sentencing Commission and congressional policy. But when a guideline's text is so vague that the Commission's recommendation cannot be ascertained, structuring the sentencing proceeding around a judge's guess at the provision's meaning creates an intolerable risk that the sentence imposed is the product of "unfair and arbitrary judicial action," which the Due Process Clause forbids. *Rogers* v. *Tennessee*, 532 U.S. 451, 466-467 (2001).

3. Amicus contends (Br. 28-30) that this Court's decision in *Peugh* lacks legal relevance here because *Peugh* applied the "significant risk" standard developed in this Court's Ex Post Facto Clause precedents. *Peugh*, 133 S. Ct. at 2088. While it is true that *Peugh* applied the "significant risk" standard, amicus misses the broader import of the Court's analysis. The Court concluded that creating a "significant risk" of a higher Guidelines sentence based on a retroactive provision would violate basic notions of "fundamental justice," even though the Guidelines are merely advisory, and even though the retroactive guideline could not change the statutorily authorized range of punishment. *Id.* at 2084, 2088 (citation omitted).

A similar analysis applies here. Like the bar on ex post facto laws, the vagueness doctrine is founded on "ordinary notions of fair play and the settled rules of law." *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The lesson of *Peugh* is that violating such fundamental legal norms in promulgating Guidelines provisions, in a way that is likely to increase the typical defendant's sentence, can be unconstitutional even if the statutory range of punishment is not increased. In this context, when a court applies a Guidelines provision that is so vague that it would be declared void on its face if it were a criminal statute, and that application is likely to increase the sentences that most defendants subject to it would otherwise receive, the process offends "fundamental justice."[1]

Amicus also seems to dispute (Br. 23) the proposition that the Guidelines range in fact exerts a significant effect on actual sentences imposed, despite this Court's recognition just seven months ago of the "real and pervasive effect" that the Guidelines have on sentences. *Molina-Martinez*, 136 S. Ct. at 1346. He notes that last year slightly fewer than half of federal sentences fell within the Guidelines range. But that is not the proper measure of the effect of the Guidelines on sentencing. This is not only because the majority of below-range sentences are government-sponsored and thus authorized by the Guidelines; it is because the

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[1] Although amicus contends (Br. 28-29) that *Peugh* rested on the concern with legislative vindictiveness against disfavored groups, that consideration was mentioned only by the plurality, which suggested that it was not "directly implicated," 133 S. Ct. at 2085, while the majority relied on the interest in "fundamental justice," *id.* at 2088 (citation omitted).

range affects even out-of-range sentences. A judge who believes that a defendant is atypical may choose to impose a sentence outside the Guidelines range, but the starting point still has substantial influence on the ultimate sentence. As this Court has repeatedly explained, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2084). That direct relationship between the Guidelines range and the sentences actually imposed underscores the procedural unfairness of calculating the range based on a provision that is so "shapeless" that it cannot satisfy the criminal-law vagueness standard. *Johnson*, 135 S. Ct. at 2560.

4. Amicus relies (Br. 24-26) on this Court's holding in *Irizarry* v. *United States*, 553 U.S. 708 (2008), that the Due Process Clause does not entitle a defendant to notice that the district court will vary from the advisory Guidelines range. *Id.* at 713-714. But he does not seriously address the government's explanation (U.S. Br. 47) of why the due process problem generated by a vague guideline differs from the notice issue discussed in *Irizarry*.

The problem with a vague guideline is not that a defendant lacks notice that he could be sentenced anywhere within the statutorily authorized range of punishment. After *Booker*, he clearly has such notice, which is why *Irizarry* held that no further notice is required. 553 U.S. at 713. A defendant always knows to make arguments based on the particular facts of his case in light of the Section 3553(a) factors because the judge must always consider those factors. A vague guideline, in contrast, hinders procedural fairness on two levels. First, it makes it difficult or impossible to

frame logical arguments to influence the judge's calculation of the range. And second, it skews the framework for sentencing because it produces a starting range that the judge will assume reflects the expert views of the Sentencing Commission. But in reality, the fatal indeterminacy of the guideline text means that the range was calculated arbitrarily, based on the judge's guess at what the language means, or how it applies to the case at hand, rather than on any consideration of relevance to criminal sentencing. That kind of procedural unfairness was not at issue in *Irizarry*. No inconsistency exists in concluding that a defendant has no due process right to case-specific notice that the judge may vary from the Guidelines range, but that he does have a due process right to have the judge calculate the Guidelines range in a non-arbitrary manner.

B. A Vague Guideline Injects Potential Arbitrariness Into The Sentencing Process In A Manner That Is Not Found In Purely Discretionary Sentencing

Amicus contends (Br. 12-14) that because a system of "pure discretionary sentencing is constitutional," due process permits a district court to anchor the sentencing process around a range derived from a vague guideline. That contention is incorrect.

1. In a traditional discretionary sentencing system, the sentencing judge considers the full range of relevant aggravating and mitigating facts and circumstances, as well as her view of proper sentencing policy, and then exercises sentencing discretion in light of those relevant considerations. As a leading Nineteenth Century treatise explained, when "the punishment is discretionary with the tribunal," the sentencer "listen[s] to the aggravating and mitigating facts, and

place[s] it where justice and sound policy for the particular instance dictate." 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law* § 601, at 371 (8th ed. 1892) (cited in *Apprendi* v. *New Jersey*, 530 U.S. 466, 519 (2000) (Thomas, J., concurring)). That system draws on individualized judicial judgment to determine the appropriate sentence in light of particular facts, reflecting the unique considerations that bear on the sentence in each case. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). Courts have exercised that sort of individualized judgment for centuries, *Apprendi*, 530 U.S. at 481 (citing *Williams* v. *New York*, 337 U.S. 241, 246 (1949)), and the reliance on judicial judgment to frame reasoned sentences within broad ranges has never been thought to reflect the sort of arbitrariness that violates due process.[2]

An inscrutably vague advisory guideline, however, injects arbitrariness into the sentencing process that

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[2] Arbitrary action is action "with no purpose or objective." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 73 (1995). An individualized discretionary sentencing, by contrast, relies on "conscientious judgment, not arbitrary action," and is conducted in accord with "familiar principles governing the exercise of judicial discretion." *Burns* v. *United States*, 287 U.S. 216, 222-223 (1932) (discussing discretionary probation revocation). The judge "takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.'" *Id.* at 223 (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)).

is not found in the exercise of unguided discretion in a traditional sentencing system. Lower courts have consistently recognized, for example, that a court's reliance on material factual misinformation at sentencing may violate due process.[3] Reliance on an arbitrarily calculated range raises similar concerns. A vague guideline requires the sentencing judge to take into account an erroneous consideration: namely, that the expert Sentencing Commission recommended a particular range for the defendant based on his offense characteristics and criminal history, even though no one knows what the Commission recommended. The district judge must nevertheless treat the range as reflecting the considered views of the Commission; indeed, the judge would commit procedural error by failing to take into account that range in her sentencing determination or by failing to offer a sufficiently detailed explanation for varying from it. And likewise, if the defendant appeals a within-Guidelines sentence, the appellate court must also deem the sentence consistent with the recommendation of the Sentencing Commission and may for that reason apply a presumption of reasonableness even though, in reality, the Commission's views cannot be discerned.

That violates due process. To require a sentencing judge and an appellate court to treat a numerical range as the recommendation of an expert commis-

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[3] See, *e.g.*, *Hili* v. *Sciarrotta*, 140 F.3d 210, 215 (2d Cir. 1998) ("It is well established that a defendant has a due process right not to be sentenced on the basis of information that is materially false."); *United States* v. *Pellerito*, 918 F.2d 999, 1002 (1st Cir. 1990) (same); *United States* v. *Reid*, 911 F.2d 1456, 1463-1464 (10th Cir. 1990) (same), cert. denied, 498 U.S. 1097 (1991).

sion, when the text of the provision renders it impossible to know what the commission actually concluded, infringes "ordinary notions of fair play," *Johnson*, 135 S. Ct. at 2556-2557 (citation omitted). The result is that the sentencing process will be skewed by misinformation about the Commission's views on the appropriate sentence, because the judge must calculate and consider the range based on a legal text from which it is impossible to "derive meaning." *Id.* at 2560.

A sentence imposed under a purely discretionary sentencing system does not produce that type of arbitrariness. The system is simply individualized. For generations, legislatures have relied on individual judicial judgment to balance case-specific equities in order to impose a fair sentence. That system will not generate uniformity, see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1988) (noting "[s]erious disparities" in the discretionary system), but vesting judges with responsibility to fix sentences based on unique facts is not arbitrary. In contrast, it is arbitrary to require judges to guess about the meaning of text that amounts to a linguistic "black hole," *Johnson*, 135 S. Ct. at 2562 (citation omitted), and then calculate a numerical range derived from that guess as the "lodestar" of sentencing, *Molina-Martinez*, 136 S. Ct. at 1346; see also 18 U.S.C. 3553(a)(6) (directing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *Gall* 552 U.S. at 54 (consideration of the advisory range helps to "avoid unwarranted disparities"). Such a legal regime is arbitrary because the court is forced to employ a sentencing benchmark that cannot rationally

be determined because the text that governs it is hopelessly vague.

2. A hypothetical example illustrates the point. Suppose that a sentencing judge were required to flip a coin to determine a starting benchmark range—a range that shapes the ensuing sentencing process by "inform[ing] and instruct[ing] the district court's determination of an appropriate sentence," *Molina-Martinez*, 136 S. Ct. at 1346, and that would entitle any sentence within that range to a "presumption of reasonableness" on appellate review, *Gall*, 552 U.S. at 51. Heads would produce a starting range of 262 to 327 months, tails a range of 360 months to life. Cf. Pet. Br. 6. Such a sentencing regime would produce arbitrary and unfair results that do not exist in a purely discretionary system that relies on good-faith judicial judgment informed by the relevant facts. When a coin flip dictates radical differences in the starting point and initial benchmark for sentencing, the sentencing process and likely outcome would be determined entirely by chance.

Applying a fatally vague guideline is not as arbitrary as a coin flip, but its effect on the sentencing process is similar. *Johnson* held that the language at issue here is "a black hole of confusion and uncertainty" and described how lower courts had reached widely divergent rulings about particular categories of predicate offenses based on "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." 135 S. Ct. at 2560, 2562 (citation omitted). Such "unavoidable uncertainty and arbitrariness of adjudication" *id.* at 2562, means that in many cases, the starting benchmark for a defendant's sentencing

proceeding will be determined based on a judge's "guesswork and intuition," *id.* at 2559, about the applicability of an indeterminate phrase. For example, enhanced sentencing ranges for violent recidivists may be wrongly or randomly assigned to defendants who should not bear that treatment in the Commission's judgment. Judges will of course struggle in good faith to apply vague language. But when the language reaches the level of inscrutability for criminal vagueness, they cannot avoid arbitrary results.

Amicus is therefore wrong that a vague guideline "does not make things worse" (Br. 14) than purely discretionary sentencing. Discretionary sentencing is individualized, not arbitrary. In contrast, a vague guideline requires judges to treat a numerical range that was derived through conjecture about the meaning of a critical phrase as reflecting the considered views of the Sentencing Commission, and to accord that benchmark a central role in the sentencing process.

3. In its opening brief, the government explained (at 43-44) that, in the Eighth Amendment context, this Court has recognized that a jury's consideration of a vague aggravating factor is unconstitutional, even if the jury's role is only to recommend a sentence to the judge and the judge does not directly consider the vague factor but merely gives weight to the jury's recommendation. *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992) (per curiam). That holding is relevant here because it illustrates the "potential for arbitrariness," *ibid.*, when a vague standard informs one consideration that the sentencer must take into account.

Amicus states (Br. 19-20 & n.2) that the opening brief "lifted" *Espinosa* out of context because "pure

discretionary sentencing" is not permitted in the capital-sentencing context, so *Espinosa*'s invalidation of a vague indirect factor is not relevant to non-capital sentencing, where discretionary sentencing is permissible. That argument reflects a misunderstanding of Eighth Amendment doctrine. It is true that at the first, "eligibility" phase of capital sentencing, "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty." *Loving* v. *United States*, 517 U.S. 748, 755 (1996) (citations and internal quotation marks omitted). But once it is determined that the defendant falls within a narrower category of offenders (either through aggravating elements of the offense or an eligibility-phase sentencing proceeding, see *ibid.*), the sentencer then may consider the full range of relevant considerations during the "selection" phase. See *Buchanan* v. *Angelone*, 522 U.S. 269, 275-276 (1998). The Constitution thus permits the jury to have "unbridled discretion" to consider relevant evidence at that phase. *Ibid.*

Espinosa concerned the second, "selection" phase of capital sentencing. See 505 U.S. at 1083 (Scalia, J., dissenting) ("Since the Florida courts found several constitutionally sound aggravating factors in this case, Espinosa's death sentence unquestionably comports with the 'narrowing' requirement of *Furman* v. *Georgia*, 408 U.S. 238 (1972)."). The Court held that the invalid aggravating factor had, through the jury's nonbinding recommendation to the judge, skewed the judge's "weighing [of] aggravating and mitigating circumstances." *Id.* at 1081-1082. The Court explained that the weighing of a factor that that "is so vague" that it does not provide "sufficient guidance for determining the presence or absence of the factor"

creates a fatal "potential for arbitrariness," even if the factor serves only as one consideration in a non-binding recommendation to the ultimate sentencer. *Ibid.* *Espinosa* therefore illustrates that even where the Constitution permits discretionary sentencing, incorporating an impermissibly vague factor into a non-binding recommendation, to which the decisionmaker must accord "great weight," *id.* at 1082, can render the ultimate sentencing determination unconstitutionally arbitrary.

C. A Vague Guideline Gives Rise To Fundamental Procedural Unfairness Even Though It Does Not "Regulate Private Conduct"

Amicus also contends that the vagueness doctrine applies only to "measures that directly regulate private conduct" and that for that reason the Guidelines are not subject to the vagueness doctrine. Br. 14 (capitalization altered). That argument lacks merit.

1. As an initial matter, amicus is incorrect (Br. 17) that "[t]he common thread" weaving through all of this Court's vagueness decisions "is that measures were void because the public could not know what was proscribed." Although most of this Court's vagueness decisions have concerned provisions drawing the line between lawful and unlawful conduct, this Court has also concluded that statutory provisions delineating the punishment for indisputably unlawful conduct are subject to the vagueness doctrine. Indeed, *Johnson* itself held as much: "[Vagueness] principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." 135 S. Ct. at 2557 (citing *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979); see *United States* v. *Evans*, 333 U.S. 483, 487-488 (1948) (holding that a statute that prescribed "no

penalty" for an offense was impermissibly vague). Although amicus claims (Br. 16) that *Johnson* applied the vagueness doctrine to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), only because the ACCA "define[s] a separate crime," this Court has never held that ACCA defines a separate crime. It is a sentencing provision.

2. In any event, amicus's "private conduct" argument fails to grapple with the basic reason that a vague guideline violates due process: not because it leaves uncertainty about what conduct is unlawful, or about the statutorily authorized range of punishment for that conduct, but because it fundamentally distorts the process of sentencing by anchoring the judge's exercise of discretion to an arbitrarily determined range.

It is true that the problem here is different from the problem in other cases in which this Court has declared a statute void for vagueness. In those cases, the challenged statute gave rise to a *substantive* problem: A person of ordinary intelligence could not determine what conduct was prohibited or what range of punishment was prescribed for the offense. That is why those holdings applied retroactively on collateral review. See *Welch* v. *United States*, 136 S. Ct. 1257, 1263-1268 (2016).

By contrast, a vague advisory guideline gives rise to a *procedural* problem: The sentencing process is anchored to a starting benchmark determined arbitrarily, based on a court's conjecture about the meaning of an impenetrable text, not based on the reasonably discernible views of the Sentencing Commission or any other criteria relevant to the sentencing process. Yet the federal sentencing framework requires the

court to treat that range as reflecting the considered judgment of the Commission. It is that procedural problem, in conjunction with the Guidelines' significant effect on sentences actually imposed, that offends due process.

Amicus does not seriously address that argument. He merely argues (Br. 15-17) that this Court has never held a provision akin to an advisory guideline void for vagueness. That is true, but it is equally true that the Court has never held that such a provision is immune from vagueness scrutiny. It is not an issue that has previously arisen, because nothing quite like the advisory Guidelines existed for federal sentencing before *Booker*. The question to resolve here, therefore, is whether the basic guarantee of the Due Process Clause against "unfair and arbitrary judicial action," *Rogers*, 532 U.S. at 466-467, is implicated when a district court is legally required to consider a range calculated based on a "hopeless[ly] indetermina[te]" provision of the Guidelines, *Johnson*, 135 S. Ct. at 2558. For the reasons discussed above, that procedural unfairness violates due process.

3. Amicus relatedly argues (Br. 20) that the government has "offer[ed] no principle to determine when a non-binding measure becomes 'binding enough' to risk being unconstitutionally vague." That argument misses the point. The Guidelines range is not substantively binding in any sense; a judge has authority to impose a sentence anywhere within the statutorily authorized range. That is why a judge's fact-finding in calculating the range does not violate the Sixth Amendment. *Booker*, 543 U.S. at 233. And contrary to amicus's suggestion (at 32-33), applying vagueness principles to advisory Guidelines no more risks recre-

ating a Sixth Amendment problem than applying the *Ex Post Facto* Clause, see *Peugh*, 133 S. Ct. at 2087-2088. The due process problem arises from the vital *procedural* role that the Guidelines range plays in the sentencing process and in appellate review. Though not binding, the starting benchmark must be taken by the parties and the courts to reflect the considered recommendation of the Sentencing Commission. If that range was instead determined through the judge's "guesswork and intuition," *Johnson*, 135 S. Ct. at 2559, the ensuing process is unfair.

D. Subjecting The Guidelines To Vagueness Scrutiny Will Not Impede The Work Of The Sentencing Commission

Amicus contends (Br. 30-35) that subjecting the Guidelines to vagueness scrutiny would "threaten[] the work of the Commission and could wreak havoc on the states that use sentencing guidelines." *Id.* at 33. That concern is groundless. Applying the vagueness doctrine here is highly unlikely to invalidate other guidelines currently in force. And more importantly, where a guideline is so unclear that it would be facially void for vagueness, it does not serve the Commission's interests to have federal judges continue to engage in the "failed enterprise" of attempting to apply it. *Johnson*, 135 S. Ct. at 2560.

1. Amicus contends (Br. 31-33) that many other provisions of the Guidelines would be vulnerable to a vagueness challenge. That is incorrect. The problem with the residual clause of the ACCA and the former residual clause of Section 4B1.2(a)(2) arises from a confluence of "uncertainties": applying a risk standard to the ordinary case of an offense; the requirement that judges consider conduct that might occur after

completion of the offense; the confusing list of enumerated crimes; and the long history of failed efforts by this Court to construe that language and the widespread confusion among lower courts. *Johnson*, 135 S. Ct. at 2560; see *id.* at 2557-2560. It was the "sum" of those problems that led the Court to conclude that the ACCA's language was unconstitutionally vague, *id.* at 2560 (citation omitted), and that requires the same result here.

No reason exists to believe that other provisions of the Guidelines raise comparable vagueness concerns. Indeed, the Ninth Circuit has held for at least 25 years that the Guidelines are subject to vagueness scrutiny, see *United States* v. *Helmy*, 951 F.2d 988, 993 (9th Cir. 1991), cert. denied, 504 U.S. 945 (1992), yet that court has never held that a guideline is unconstitutionally vague. The former residual clause of Section 4B1.2(a)(2) stands alone.

Amicus's lead example of a provision that would be in jeopardy under vagueness doctrine is the vulnerable-victim guideline, § 3A1.1, which increases a defendant's offense-conduct score by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim," defined in the commentary to include, *inter alia*, a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." Sentencing Guidelines § 3A1.1 & comment. (n.2). Unlike the residual clause, however, that provision calls for a case-specific evaluation of whether the victim was particularly vulnerable to the criminal scheme, with the commentary giving the examples of "a fraud case in which the defendant marketed an ineffective cancer cure," or "a rob-

bery in which the defendant selected a handicapped victim," *ibid.* Although different judges might disagree in borderline cases over whether a victim was especially susceptible to particular offense conduct, that provision does not involve basic uncertainty about "the nature of the inquiry" that courts must undertake, *Johnson*, 135 S. Ct. at 2560. And disagreements about close cases under an intelligible, if qualitative, standard do not make a provision vague. *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). Indeed, *Johnson* itself did "not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," 135 S. Ct. at 2561, and the vulnerable-victim guideline is just such a provision.

The same is true of the other provisions that amicus cites. They bear no similarity either to the categorical risk analysis that *Johnson* found problematic or to other statutes that this Court has held unconstitutionally vague, which often relied on subjective value judgments open to a wide range of interpretation. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615-616 (1971) (holding unconstitutionally vague ordinance prohibiting "annoying" conduct); *United States* v. *L. Cohen Grocery*, 255 U.S. 81, 89 (1921) ("unjust or unreasonable rate or charge").

Furthermore, no sound basis exists to believe that the Commission would draft unconstitutionally vague guidelines in the future. Apart from Section 4B1.2(a)(2)'s former residual clause, which was borrowed from the ACCA, and which this Court declared unconstitutional only after a decade of efforts to construe it, amicus has pointed to no evidence that the Commission has struggled to draft guidelines that are

sufficiently clear to satisfy the minimal standard of the vagueness doctrine. Moreover, as explained in the government's opening brief (at 53-57), any ambiguity in the text of a guideline can be eliminated or reduced through the Commission's authoritative commentary.

2. Amicus also contends (Br. 30-31) that if the Guidelines are subject to the vagueness doctrine, the statutory sentencing factors set forth at 18 U.S.C. 3553(a) would also be invalid. As explained in the government's opening brief (at 42), that is incorrect. The Section 3553(a) factors essentially capture the general set of considerations relevant to a sentencing determination. Just as traditional discretionary sentencing regimes do not raise due process problems, a statutory command to consider a set of general factors in sentencing is not unconstitutionally vague. The Guidelines are different because they require a court to decide whether the facts of the case satisfy a legal standard in order to derive a specific numerical range. That range reflects the expert recommendation of the Sentencing Commission, and for that reason it structures the sentencing process and appellate review, and it exerts a substantial effect on the sentences actually imposed. The general Section 3553(a) factors have none of those characteristics.

3. Finally, amicus argues (Br. 33-35) that applying the vagueness doctrine to the Guidelines will impede the work of the Sentencing Commission. The opposite is true. If the Commission drafts a guideline that is so indefinite that it would be subject to facial invalidation for vagueness, then courts necessarily would struggle and fail to ascertain the Commission's true recommendation. Requiring courts to continue engaging in a "task * * * which at best could be only guesswork,"

Johnson, 135 S. Ct. at 2560 (citation omitted), does not vindicate the Commission's important role.

Amicus also asserts (Br. 33) that the "Commission is charged with addressing the same questions that this Court is asking in this case," such as whether a guideline is "still fit for its intended purpose and, if not, [whether] an amendment eliminating it [should] be retroactive." Those are not the questions posed by a vagueness challenge like this. Rather, the question is whether the Commission has expressed its meaning with sufficient clarity that a court can apply the guideline in a non-arbitrary manner. Nor is a vagueness challenge, as amicus characterizes it (Br. 34), "an attempt to obtain judicial second-guessing of the Commission's expert decisions." It instead is an argument that the Commission's recommendation cannot be discerned. As amicus himself puts it (Br. 30), "[b]y definition," when a provision is unconstitutionally vague, "no one knows what it means." If "no one knows" what a Guidelines provision means, it is hard to see how continuing to enforce that provision respects the Commission's work.

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For the reasons stated in the government's opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

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